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Supreme Court, U.S.
FILED

02-1433 MAR 17 2003

OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States

DAVID RAY HARRIS,
Petitioner

vs.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Fifth Circuit properly disregard defense counsel's failure to investigate and present available mitigation evidence, even though (a) the court viewed the omitted evidence in isolation from the circumstances of the crime and from the mitigating evidence that was presented to the jury, and (b) the Fifth Circuit's decision conflicts with the results reached, on closely analogous facts, by many other circuits?

2. At a capital sentencing hearing, can the State constitutionally use, in its efforts to convince the jury to find the aggravating circumstances required as a prerequisite to the death penalty, evidence of a crime for which a prior jury had acquitted the defendant?

3. Can a death sentence be upheld, consistent with *Penry v. Lynaugh*, 492 U.S. 302 (1989), and *Penry v. Johnson*, 532 U.S. 782 (2001), when the jury was precluded from considering the full mitigating impact of undisputed evidence that the victim initiated the exchange of gun fire that resulted in his death and that the defendant did not fire any shots until after himself being wounded in the neck and shoulder?

4. Can a death sentence be upheld, consistent with *Penry v. Lynaugh*, 492 U.S. 302 (1989), when the jury was precluded from considering the full mitigating impact of undisputed evidence that the defendant suffered from severe alcoholism and drug addiction (and that all of the prior criminal activity proffered by the State at the sentencing hearing was committed under the influence of drugs or alcohol)?

LIST OF PARTIES

The Petitioner, David Ray Harris;

The Respondent, Janie Cockrell, Director, Texas Department of Criminal Justice, Institutional Division.

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The decision of the United States Court of Appeals for the Fifth Circuit, reported at 313 F.3d 238 (5th Cir. 2002), is reprinted at Pet. App. A-1 through A-14. The Decision of the United States District Court for the Eastern District of Texas is an unpublished memorandum opinion reprinted at Pet. App. F-1 through F-24. The order of the United States Court of Appeals for the Fifth Circuit, denying rehearing and rehearing *en banc* is reproduced at Pet. App. C.

JURISDICTION

The Court of Appeals' judgment was entered November 18, 2002. Timely petitions for rehearing and rehearing *en banc* were denied on December 16, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the provision of the federal habeas statute governing federal review of state court decisions in effect prior to the passage of the Antiterrorism and Effective Death Penalty Act in 1996, 28 U.S.C. § 2254. The text of the statute is reprinted at Pet. App. G.

STATEMENT OF THE CASE

A. Background

During the night of September 1, 1985, David Ray Harris entered the apartment of Mark Mays in Beaumont, Texas. Harris was armed, but he intended only to commit burglary. Harris was unaware that Mays and Roxanne Lockard were asleep in the bedroom. When Harris entered the bedroom, Mays and Lockard were awoken by a light. At that point, Harris instructed Mays to lock himself in the

bathroom. Harris left the apartment with Lockard and, once outside, directed her to get into the passenger side of Harris's pickup truck. Harris then walked around the truck to the driver's side. As Harris was entering his truck, Mays emerged from the apartment with a gun and began firing at Harris. Harris was wounded in the neck and shoulder and, only at that point, returned fire. Several shots were exchanged and, during the exchange, Lockard fled. Mays died from wounds received in the exchange of gun fire – an exchange that Mays had initiated by firing first at Harris. Harris, himself wounded, left the scene alone.

B. The Guilt/Innocence Phase of Harris's Trial

On September 26, 1985, Harris was indicted for the capital murder of Mark Mays. The crime was charged as a capital offense because it was allegedly committed in the course of the kidnapping of Roxanne Lockard. Dennis Powell and Clay Dugas – two young attorneys with scant experience defending capital cases – were retained to defend Harris. They were paid a flat fee to cover their time and all expenses incurred in defending the case.

The case was defended at trial on the theory that Harris was guilty of the lesser-included offense of voluntary manslaughter. Under Texas law, voluntary manslaughter is defined as "caus[ing] the death of an individual under circumstances that would constitute murder except that [the defendant] caused the death under the immediate influence of sudden passion arising from adequate cause." Dugas and Powell premised their voluntary-manslaughter defense of Harris on the theory that Harris did not fire any shots until Harris himself had been shot and wounded in the neck and shoulder by Mays. They thus pinned all of their hopes on convincing the jury that Mays's shooting of Harris

constituted "adequate cause" that gave rise to "sudden passion."

The trial court instructed the jury on the lesser-included offense of voluntary manslaughter. However, the instruction improperly allocated the burden of proof, in violation of *Cobarrubio v. State*, 675 S.W.2d 749 (Tex. Crim. App. 1983). The *Cobarrubio* error existed because the charge failed to require the State to disprove sudden passion. After a 2-day trial (exclusive of jury selection) in April 1986, the jury rejected the manslaughter defense and found Harris guilty of capital murder.

C. The Sentencing Phase of Harris's Trial

The sentencing phase of Harris's trial began on April 28, 1986, and ended the very next day. The State called several witnesses to testify to the circumstances surrounding certain unadjudicated extraneous offenses and prior convictions. The State also offered "pen packets" relating to prior convictions of Harris, as well as the uninformed and entirely speculative opinion of a psychiatrist who had never examined Harris, let alone treated him. The State was also allowed to introduce evidence that Harris had committed a prior kidnapping, even though Harris had been tried for and acquitted by a jury of that alleged kidnapping offense.

Dugas and Powell offered only two witnesses on Harris's behalf at the punishment phase, both of whom were acquainted with Harris only by virtue of Harris's prior criminal activity: Evelyn Nora Powell, Harris's alcohol-abuse counselor, and Nancy Petkovsek, Harris's parole officer. They both provided testimony that Harris was a severe alcoholic and drug addict whose normally shy and introverted personality was dramatically transformed when

he was under the influence of alcohol or drugs.[1] Beyond that, Dugas and Powell failed to offer any of the vast array of additional mitigating evidence (the substance of which is described below) that would have been available to them, had they bothered to conduct an investigation in preparation for the sentencing phase of Harris's trial.

The jury was asked the now-discredited special issues that, in 1986, formed the basis of the Texas death-penalty sentencing scheme: (1) Was the conduct of the defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result? (2) Is there a probability that the defendant will commit criminal acts of violence that will constitute a continuing threat to society? (3) Was the conduct of the defendant in killing the deceased unreasonable in response to the provocation, if any, by the deceased?

The jury answered "yes" to all three special issues, and Harris was sentenced to die by lethal injection.

D. Direct Appeal of Harris's Conviction

Powell and Dugas withdrew from Harris's representation after the death sentence was imposed. The state court then appointed counsel to represent Harris in his direct appeal. The Texas Court of Criminal Appeals affirmed Harris's conviction and death sentence, with one justice dissenting. *Harris v. State*, 784 S.W.2d 5 (Tex. Crim. App. 1989), *cert. denied*, 494 U.S. 152 (1990). Harris's petition for *certiorari* was subsequently denied.

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[1] They also testified that Harris was making sincere efforts to deal with his alcoholism.

The Texas Court of Criminal Appeals held, among other things, that it was not necessary to determine whether the jury charge, in violation of *Cobarrubio*, misallocated the burden of proof on voluntary manslaughter. According to the Court of Criminal Appeals, Harris was not entitled to a voluntary-manslaughter charge at all – a conclusion based on the fact that Harris had himself initiated the criminal episode that resulted in Mays's death and on the notion that Mays's lawful conduct in defending Lockard could not, as a matter of law, constitute "adequate cause." 784 S.W.2d at 10. There is no evidence in the record that Harris's trial counsel had ever informed Harris that there was any impediment to the assertion of his only defense, let alone that this legal issue could transform his guilt-innocence trial into a completely futile exercise.

For present purposes, the holding of the Texas Court of Criminal Appeals that Harris was not entitled to a voluntary-manslaughter charge must be accepted. From that premise, it is now clear that the ultimate result for Harris at the guilt-innocence phase of his trial was a foregone conclusion. With Harris's only defensive theory unavailable as a matter of law, Harris's only hope of escaping the death penalty rested on an effective presentation of mitigating evidence at the punishment phase. This stark reality renders the failure (discussed below) of his trial counsel to investigate and present mitigating evidence all the more devastating.

E. State Post-Conviction Proceedings

After his conviction and sentence were affirmed on direct appeal, Harris filed a state *habeas* application. Harris's petition included, among others, a record *Penry* claim,[2] a non-record *Penry* claim, a challenge to the admission during the sentencing phase of evidence of an

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[2] *See Penry v. Lynaugh*, 492 U.S. 302 (1989).

alleged kidnapping of which Harris was acquitted, and a claim for ineffective assistance of counsel.

After the state trial court summarily denied Harris's *habeas* application, the Texas Court of Criminal Appeals remanded the case to the trial court instructing it to hear evidence on Harris's claim of ineffective assistance of counsel. The evidence on remand included a substantial record of compelling mitigating evidence that was available, but was never investigated or presented by Harris's trial counsel. As later described in the Report and Recommendation of Federal Magistrate Judge Wendell Radford, there was mitigating evidence available that:

> Harris suffered intense and consistent emotional abuse at the hands of his father, the trauma of losing his younger brother from drowning at age four, the trauma of being blamed by his father for his brother's death, below-average intelligence, being ostracized at school because of rumors of a homosexual episode, being homosexually gang raped at age 13, three organic brain injuries which required hospitalization, and substance and alcohol abuse from an early age and . . . steady improvement [in Harris's prison record].

It is undisputed that most, if not all, of this evidence was unknown to Dugas and Powell, primarily because they failed to perform any real investigation in preparation for the sentencing phase of Harris's trial.

The state *habeas* court, based on affidavits from Dugas and Powell, nevertheless dismissed out of hand Harris's ineffective-assistance claim. Dugas and Powell both claimed that their failure to investigate and present mitigating evidence was at the direction of Harris himself. Harris allegedly instructed Dugas and Powell to focus only on the

guilt-innocence phase of trial and to refrain from preparing or presenting a case in mitigation. (Assuming Harris gave that instruction (which is denied), it was without the benefit of any warning from Dugas or Powell that Harris's sole defense at guilt-innocence might be unavailable as a matter of law.)

Based on the affidavits of Dugas and Powell, the trial court found that trial counsel performed extensive research and discussed all matters fully with Harris and that the evidence offered at the sentencing phase was a matter of trial strategy. As later determined (after evidentiary hearings) in Harris's federal *habeas* proceeding, there exists convincing evidence rebutting the presumption of correctness[3] otherwise applicable to these findings.[4] The Court of Criminal Appeals nevertheless adopted them.

Ultimately, the Court of Criminal Appeals, with three justices dissenting, issued a published opinion discussing and rejecting Harris's *Penry* claim. *Ex Parte David Ray Harris*, 825 S.W.2d 120 (Tex. Crim. App. 1991). The rest of Harris's claims were denied, in a footnote and without comment, on "the basis of the trial court's findings of fact and conclusions of law." *Id.* at 122, n.3.

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[3] This *habeas* case was filed before April 24, 1996, so the Antiterrorism and Effective Death Penalty Act does not govern review of this case. *Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997).

[4] At the evidentiary hearing in federal court, it was established that the "investigation" conducted by Powell and Dugas consisted of little more than three brief meetings with Harris's mother and a cursory review of some materials she provided. In addition, Powell essentially admitted that he ignored or violated Harris's instructions when he felt it important to do so.

F. Federal Post-Conviction Proceedings

After the Texas Court of Criminal Appeals denied habeas relief, Harris filed a *habeas* petition in federal district court. The case was assigned to the Honorable William Wayne Justice. Judge Justice conducted two evidentiary hearings and then referred the case to Magistrate Judge Wendell Radford. The Magistrate Judge issued a Report and Recommendation recommending that Harris's petition be granted on the ground that he received ineffective assistance of counsel at the punishment phase of his trial. The Magistrate Judge recommended that relief be denied on all other claims raised by Harris.

The district court adopted the Magistrate Judge's recommendation regarding the ineffective-assistance claim. The district court also adopted the recommendation that all of Harris's other claims be denied, except Harris's claim regarding the jury's inability to give mitigating effect during sentencing to the evidence that Mays shot and wounded Harris before Harris ever fired a shot. With respect to that claim, the district court concluded that Harris was entitled to relief because the third special issue, especially when considered in the context of the jury's prior rejection of the voluntary-manslaughter defense, provided no opportunity for the jury to give effect to the mitigating impact of the circumstances of the crime.

Based on these determinations, the district court issued a conditional writ of *habeas corpus* directing the State, within 180 days, to either release Harris, sentence him to life in prison or to provide him with a new sentencing hearing.

The State filed a notice of appeal. Harris cross-appealed with respect to the denial of three of his claims: the record *Penry* claim related to Harris's alcoholism and intoxication at the time of the offense; the claim regarding the

prosecutor's improper jury argument at the guilt-innocence phase of his trial;[5] and the claim regarding the admission of evidence of a kidnapping of which Harris had been acquitted.

G. The Fifth Circuit's Ruling

The Fifth Circuit declined Harris's request for oral argument. On November 18, 2002, the Fifth Circuit reversed the district court's grant of *habeas* relief to Harris, affirmed the denial of all of Harris's other claims for relief, and rendered judgment in favor of the State. Timely petitions for panel and en banc hearing were overruled on December 16, 2002.

With respect to the ineffective-assistance claim, the Fifth Circuit assumed (without deciding) that trial counsel rendered ineffective assistance at the punishment phase of Harris's trial. However, the Court reversed the grant of relief on this claim based on the conclusion that Harris had not satisfied the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984). In making this determination, the Fifth Circuit: failed to consider that Harris's crime, on the continuum of capital offenses, was comparatively less brutal and depraved than most; significantly understated the strength of the available mitigating evidence that Harris's counsel failed to present; significantly overstated the strength of certain aggravating evidence; and ignored the impact of the mitigating evidence that was already in the record of Harris's trial, all in violation of *Williams v. Taylor*, 529 U.S. 362 (2000).

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[5] Harris is not now pursuing the claim related to improper jury argument at his guilt-innocence trial.

The Fifth Circuit also rejected Harris's claim regarding the admission of the kidnapping offense of which he had been acquitted. This decision was based on the court's prior opinions regarding evidence of extraneous offenses, which are of dubious validity in light of the principles reaffirmed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002).

Regarding evidence that Mays shot and wounded Harris first, the Fifth Circuit concluded that the third special issue provided an adequate outlet for the jury to express the mitigating impact of that evidence – even though answering the third special issue "no" would have required the jury to provide an answer that conflicted with its prior rejection at the guilt-innocence phase of Harris's manslaughter defense. The court's conclusion in this regard violates the principles of *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), and *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*").

Finally, with regard to mitigating evidence related to Harris's alcoholism and intoxication at the time of the crime, the Fifth Circuit held first that "neither evidence of alcoholism nor evidence of intoxication at the time of the offense constitutes *Penry* evidence." *Harris v. Cockrell*, 313 F.3d 238, 241-42 (5th Cir. 2002). The court also held, in any event, that intoxication and alcoholism can be given mitigating effect in answers to the first and second special issues. These determinations are in conflict with prior opinions of this Court, as well as the manner in which other circuits treat the mitigating impact of alcoholism and intoxication.

REASONS FOR GRANTING THE PETITION

This case warrants review for four separate reasons. First, the Fifth Circuit's treatment of Harris's ineffective-assistance claim violates *Williams v. Taylor*, 529 U.S. 362

(2000), and conflicts with the approach taken on closely analogous facts by the Third, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits. The Fifth Circuit's methodology would, moreover, render defense counsel's decision to refrain from investigating and presenting mitigating evidence "virtually unchallengeable," much the same way as does the Fourth Circuit approach currently under review by this Court in *Wiggins v. Corcoran*, 288 F.3d 629 (4th Cir. 2002), *cert. granted*, 123 S.Ct. 556 (2002) (No. 02-311).

Second, the Fifth Circuit's ruling that it is permissible to admit evidence of an extraneous offense for which the defendant has been acquitted flies in the face of fundamental principles of fairness reaffirmed by this Court in the closely analogous cases of *Apprendi* and *Ring v. Arizona*.

Third, the Fifth Circuit's treatment of the mitigating impact of evidence that Mays shot first is completely untenable in light of this Court's two *Penry* decisions.

Fourth, the Fifth Circuit's rejection of Harris's record *Penry* claim relating to alcoholism and intoxication violates the fundamental premise that a jury must be able to consider and give effect to all aspects of a defendant's background and character that are offered in mitigation.

ARGUMENT

I.
THE FIFTH CIRCUIT'S TREATMENT OF THE INEFFECTIVE-ASSISTANCE CLAIM RENDERS COUNSEL'S DEFICIENT PERFORMANCE "VIRTUALLY UNCHALLENGEABLE"

Under *Strickland v. Washington*, a defendant asserting ineffective assistance must first "show that counsel's

performance was deficient;" then, the defendant must show "that the deficient performance prejudiced the defense." 466 U.S. at 687.

Here, the Fifth Circuit assumed (without deciding) that the performance of Harris's trial counsel was deficient. There is overwhelming support in the record for the district court's finding to this effect. Clay Dugas admitted that he did absolutely nothing to investigate Harris's background or to prepare otherwise for the sentencing phase of trial. Dennis Powell did not do much more than Dugas. Powell never met with Harris's father. Powell met with Harris's brother for no more than five minutes. Powell never interviewed any family friends – not even Eva Stewart, who attended every day of Harris's trial. While Powell did meet with Harris's mother three times, those meetings were brief and involved no real discussion of the powerful case in mitigation that was available to Harris. Powell did receive materials from Mrs. Harris concerning Harris's background, but he did nothing with them (and did not even tell Harris that he had received them).

The district court, moreover, had before it compelling evidence to reject the excuse offered by Powell and Dugas for failing to develop a case in mitigation. According to Powell and Dugas, they refrained from developing and presenting a mitigation case because Harris told them he wanted to focus only on guilt-innocence and instructed them not to present evidence at the sentencing phase. While there is contrary evidence in the record, it can be assumed for present purposes that Harris in fact gave that instruction. Even with that assumption, the performance of trial counsel was plainly deficient for at least two reasons. First, Harris's alleged decision to focus on guilt-innocence and to refrain from offering a mitigation case was hardly fully informed, in part because Powell and Dugas never told Harris the

critically important fact that his guilt-innocence defense was based on questionable legal grounds and might be unavailable as a matter of law. Second, as Powell freely admitted at the evidentiary hearing in federal court, he did not feel constrained by Harris's instructions and ignored them when he deemed it important to do so. For example, Powell presented testimony at the punishment phase from Evelyn Nora Powell and Nancy Petkovsek, even though doing so violated Harris's instructions. Having violated Harris's instructions by presenting a fraction of the available evidence in mitigation, Powell and Dugas can hardly use Harris's alleged instruction to explain away their failure to present the rest of the powerful mitigation case that was available to Harris.[6]

With respect to *Strickland's* prejudice prong, the Fifth Circuit brushed aside Harris's arguments by suggesting that Harris's mitigating evidence was as "weak" as that described in *Duhamel v. Collins*, 955 F.2d 962 (5th Cir. 1992) (a case in which no prejudice was found), and not as compelling as the mitigating evidence in *Williams*, 529 U.S. 362 (2000) (a case affirming relief under *Strickland*). In performing its comparison of this case to *Duhamel* and *Williams*, the Fifth Circuit violated a fundamental principle set forth in *Williams*: that the "prejudice determination" must include an evaluation of "the totality of the available mitigation evidence – both that adduced at trial and the evidence in the habeas proceeding." 529 U.S. at 397-98.

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[6] Numerous cases recognize, in similar circumstances, that the defendant's instructions do not necessarily relieve counsel of the duty to investigate and present mitigating evidence. *See, e.g., Karis v. Calderon*, 283 F.3d 1117, 1136 (9th Cir. 2002); *Silva v. Woodford*, 279 F.3d 825, 838 (9th Cir. 2002); *Coleman v. Mitchell*, 268 F.3d 417, 447-48 (6th Cir. 2001); *Battenfield v. Gibson*, 236 F.3d 1215, 1233 (10th Cir. 2001).

The Fifth Circuit violated this principle by, among other things, failing to consider the facts and circumstances of Harris's crime. For example, the death of Mark Mays paled in comparison to the brutal sexual assault and murder of a nine-year old girl that had occurred in *Duhamel*. While comparatively "weak" mitigating evidence may not have made a difference in *Duhamel*, that same evidence could well have tipped the balance in favor of Harris, who was involved in an impulsive shooting in reaction to having himself been shot and wounded.

The Fifth Circuit also violated the principles of *Williams* by failing to consider the mitigating evidence that did make its way into the record, despite counsel's deficient performance. That evidence included: Harris's youth at time of the offense; Harris's cooperation with the police investigation; Harris's genuine remorse; Harris's intoxication at the time of the crime; Harris's status as a severe alcoholic and drug addict; Harris's intoxication during all of the prior extraneous offenses offered by the State at the punishment hearing; and Harris's sincere efforts, at the time of the crime, to overcome his alcoholism and drug addiction. Viewing the evidence that Harris's counsel failed to offer in isolation from the evidence that was in the record was plainly wrong. The cumulative impact of the record and non-record evidence may well have made a difference in Harris's case – but the Fifth Circuit never conducted that analysis.

The Fifth Circuit also ran afoul of *Williams* by suggesting that prejudice cannot result from the failure to present double-edged evidence that can be considered both aggravating and mitigating. The Fifth Circuit concluded, in discounting the existence of prejudice, that "[t]he jury could have viewed much of the evidence omitted by Harris's trial counsel as either mitigating or aggravating." 313 F.3d at 244. This same circumstance existed in *Williams*, where the

Court noted that, "[o]f course, not all the additional evidence was favorable to Williams." 529 U.S. at 396. Nevertheless, the Court in *Williams* concluded that there was prejudice – a finding that the Fifth Circuit seemed barely willing even to consider.

Finally, the Fifth Circuit compounded its errors by also discounting the existence of prejudice based on what it described as "overwhelming evidence of violence in Harris's background." 313 F.3d at 244. The court did not in its opinion detail any of that evidence and, as Harris pointed out in his petitions for rehearing, the record simply does not support the assertion that there is "overwhelming evidence of violence in Harris background."

The problem becomes even clearer when Harris's case is compared to the results reached in other circuits on similar facts. Indeed, the Third, Sixth Seventh, Eighth, Ninth, Tenth and Eleventh Circuits would all have likely affirmed relief for Harris based on precedent involving analogous facts.[7] In each of the cases cited in the footnote, the omitted mitigating evidence was of the same type (childhood abuse, below-average intelligence, possible brain damage) as the evidence that Harris's lawyers failed to present. In some of these cases, the mitigating evidence appears to be significantly weaker than Harris's evidence; in other cases, while the

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[7] *See, e.g., Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001); *Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997); *Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991); *Simmons v. Luebbers*, 299 F.3d 929 (8th Cir. 2002); *Antwine v. DeLo*, 54 F.3d 1357 (8th Cir. 1995); *Mayfield v. Woodford*, 270 F.3d 915 (9th Cir. 2001); *Ainsworth v. Woodford*, 268 F.3d 868 (9th Cir. 2001); *Battenfield v. Gibson*, 236 F.3d 1215 (10th Cir. 2001); *Hooper v. Mullin*, 314 F.3d 1162 (10th Cir. 2002); *Collier v. Turpin*, 177 F.3d 1184 (11th Cir. 1999); *Dobbs v. Turpin*, 142 F.3d 1383 (11th Cir. 1998).

mitigating evidence could be characterized as slightly stronger than Harris's, it is balanced against evidence of a crime far more brutal and depraved than Harris' offense. Each of these cases demonstrates that – even if it purports to apply the same legal standards – the Fifth Circuit is simply our of step with the majority of other circuits when it comes to evaluating prejudice under *Strickland*.

In *Wiggins v. Corcoran*, this Court recently granted certiorari to consider the Fourth Circuit's approach to *Strickland v. Washington* in the context of trial counsel's failure to investigate and present mitigating evidence. In *Wiggins*, the Fourth Circuit considered only the performance prong of *Strickland* and did not reach the prejudice prong. *Wiggins v. Corcoran*, 288 F.3d at 643 n.9. In this case, the Fifth Circuit assumed deficient performance and considered only the prejudice prong of *Strickland*. The basic problem, however, remains the same. The Fourth Circuit's approach to the performance prong rendered counsels' failure to develop mitigating evidence "virtually unchallengeable." The Fifth Circuit's approach likewise precludes any meaningful challenge to the failure to develop and present mitigating evidence, especially if a reviewing court can ignore in its prejudice analysis the circumstances of the crime and the other mitigating evidence in the record.

There is a pressing need to grant review in this case so that this Court can establish a fair, rational and consistent system for reviewing ineffective-assistance claims in the context of trial counsel's failure to investigate and present available mitigating evidence. In Harris's case, two federal trial judges (Judge Justice and Magistrate Judge Radford) have concluded that Harris was prejudiced by counsels' deficient performance. Three federal appellate judges, on the other hand, have concluded that Harris was not prejudiced. And, of course, the twelve people who mattered most –

Harris's jury – were not given the opportunity to decide. Harris respectfully suggests – where, as here, counsels' deficient performance undermines the very essence of the individualized sentencing determination required by the Eighth Amendment – that relief should not turn on which federal judges happen to have the last vote.

II.
THE FIFTH CIRCUIT'S TREATMENT OF THE ACQUITTAL ISSUE VIOLATES THE PRINCIPLES OF FAIRNESS RECOGNIZED IN *APPRENDI* AND *RING V. ARIZONA*

The death of Mark Mays became a capital offense only because it occurred in the course of the kidnapping of Roxanne Lockard. Accordingly, any evidence that Harris had committed prior kidnappings would likely be of great significance to jurors considering the appropriate punishment for David Ray Harris. This fact was not lost on the State, which went to extraordinary lengths to inflame the jury with "evidence" that Harris had kidnapped before.

The State offered evidence that Harris was guilty of a prior kidnapping that had allegedly taken place in California in 1979. Ray Rucker, a peace officer from California, was allowed to testify that Harris was, in Rucker's opinion, guilty of that prior kidnapping. This evidence was admitted even though Harris was acquitted of the kidnapping offense by a jury in California.

It violates fundamental principles of fairness reaffirmed in this Court's recent decisions to allow the State to use an alleged crime of which the defendant has been acquitted to convince the jury of the existence of the aggravating factors that must be found before a sentence of death can be imposed.

The Fifth Circuit rejected this claim based on its prior decision in *Vega v. Johnson*, 149 F.3d 354 (5th Cir. 1998), *cert. denied*, 525 U.S. 1119 (1999). In *Vega*, the State offered evidence at the punishment phase of a capital case that the defendant had previously committed the crime of being a felon in possession of a handgun. The defendant, however, had been acquitted of that crime. The Fifth Circuit started its analysis from the premise that "[e]xtraneous offenses offered at the punishment phase of a capital trial need not be proven beyond a reasonable doubt." *Id.* at 359. "[B]ecause the standard of proof at the punishment hearing [in a capital case is] lower than that at the original criminal trial," the court discerned no constitutional impediment to allowing the subsequent capital jury to consider evidence of an alleged crime of which the prior jury had acquitted the defendant. *Id.*[8] Presumably, the court was of the view that, while the first jury may not have been convinced beyond a reasonable doubt that the defendant had committed the crime, the second jury might find, to some lesser degree of certainty, that the defendant was guilty of the offense. Based on the existence of different standards of proof, the Fifth Circuit was untroubled by collateral estoppel and double jeopardy concerns.

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[8] The Fifth Circuit would have been forced to reach a different result in a non-capital case. The Texas Code of Criminal Procedure requires, in a non-capital case, that extraneous crimes or bad acts introduced in aggravation of a sentence must be shown beyond a reasonable doubt. Tex. Code Crim. Pro. Art. 37.07 § 3(a) (West Supp. 2003) (evidence relevant to sentencing includes "evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant"). The same protection is not provided a capital defendant. Tex. Code Crim. Pro. Art. 37.071; *Boyd v. State*, 811 S.W.2d 105 (Tex. Crim. App.), *cert. denied*, 502 U.S. 971 (1991).

The Fifth Circuit's treatment of the issue of admitting evidence of crimes for which the defendant was acquitted turns in part on the validity of the proposition that extraneous offenses offered at the punishment phase of a capital trial need not be proven beyond a reasonable doubt. In *Vega*, the court offered no guidance as to what standard of proof is required, but indicated only that it is something less than "beyond a reasonable doubt." The court cited for this proposition only other Fifth Circuit cases and one opinion from this Court – *Huddleston v. United States*, 485 U.S. 681 (1988). *Huddleston* concerned only whether a trial court was required, before admitting evidence of similar acts under Fed. R. Evid. 404(b), to make a preliminary finding that the similar act had been proved by a preponderance of the evidence. *Huddleston* simply does not support the Fifth circuit's rule regarding the standard of proof applicable to extraneous offenses at sentencing.

Two recent cases from this Court reveal the error of the Fifth Circuit's approach to the admission of extraneous offenses for which a defendant has been acquitted. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court invalidated a New Jersey procedure under which the sentence for a crime could be enhanced, upon a judge's post-conviction finding by a preponderance of the evidence that the crime had been motivated by racial animus. This Court held that, "'[I]t is unconstitutional . . . to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" *Id.* at 40 (quoting from *Jones v. United States*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)).

In *Ring v. Arizona*, 536 U.S. 584, 112 S.Ct. 2428, 153 L.Ed. 556 (2002), the reasoning of *Apprendi* was applied in

the context of the evidence offered at the sentencing phase of a capital case. In *Ring*, the Arizona death-penalty statute allowed the trial judge, after a jury verdict of first-degree murder, to determine the presence or absence of aggravating factors required by Arizona law for the imposition of the death penalty. The Court found that procedure inconsistent with *Apprendi* – without regard to whether the aggravating factors to be assessed by the trial judge were considered "elements of the offense" or "sentencing factors." *Id.* at 153 L.Ed. at 574.[9]

As Justice Scalia stated in his concurring opinion in *Ring*, "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the imposition of the level of punishment that the defendant receives . . . must be found by the jury beyond a reasonable doubt. *Ring*, 563 U.S. at 578 (Scalia, J., concurring).

It is difficult to square the underpinning of the Fifth Circuit's *Vega* opinion – that extraneous offenses offered at a capital sentencing hearing need not be proven beyond a reasonable doubt – with this Court's holdings in *Apprendi v. New Jersey* and *Ring v. Arizona*. If the Fifth Circuit's premise is not valid, then the use at a capital sentencing hearing of a crime of which the defendant has been acquitted raises serious questions under *Gardner v. Florida*, 430 U.S. 349 (1977) (holding that a capital defendant is entitled to due process at the punishment phase);and *Ashe v. Swenson*, 397

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[9] The precise issue in *Ring* was whether the judge or a jury must assess the aggravating factors that make a death sentence available – and the Court determined, based on *Apprendi*, that a jury resolution is constitutionally required. However, the requirement that a jury must assess the facts carries with it the related constitutional requirement that the jury's determination must be based on proof beyond a reasonable doubt.

U.S. 436 (1970) (holding that collateral estoppel is a requirement of due process). It also implicates the presumption of innocence, which still applies at the sentencing phase with respect to crimes other than the one of which the defendant has just been convicted. *See Herrera v. Collins*, 506 U.S. 390, 399 (1993).

This Court should grant review to consider, especially in light of *Apprendi* and *Ring v. Arizona*, whether and in what circumstances the State may introduce at a capital sentencing hearing evidence of a crime of which the defendant has already been acquitted.

III.
THE JURY WAS NOT ALLOWED TO GIVE MITIGATING EFFECT TO THE EVIDENCE THAT HARRIS DID NOT SHOOT UNTIL WOUNDED BY MAYS

It is established beyond any doubt that "the circumstances of the offense" can operate as mitigating factors from which a jury must be allowed to express a "reasoned moral response" that the defendant should not be put to death. *See Penry*, 492 U.S. at 328 (citing *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring in judgment)). Here, there are aspects of the crime – most particularly, that Mays initiated the exchange of gun fire and that Harris did not shoot until he had already been himself wounded in the neck and shoulder – that could have led a juror to express the reasoned moral response that Harris's life should be spared. The question presented is whether Texas's three special issues provided a full and fair outlet for a juror to express that view.

On this point, the Fifth Circuit focused entirely on the third special issue. Before addressing that issue, Harris would point out that neither the first nor the second issue

provides an adequate outlet for the jury to express fully the potentially mitigating impact of this evidence. Arguably, the evidence that Mays shot first is relevant to the first special issue, which asks whether the defendant's conduct was "committed deliberately" with the "reasonable expectation" that the victim or another would die. However, especially because Texas courts provided jurors with no definition of the term "deliberately," it is possible that a reasonable juror could have concluded that Harris acted "deliberately," while still believing that Harris's life should be spared (because he did not initiate the gun battle and because his "deliberate" acts were undertaken in response to being shot and wounded by Mays). The evidence concerning Mays' initiation of the exchange of gun fire thus has mitigating impact beyond the scope of the first special issue.

The second special issue likewise did not provide a full opportunity for a juror to express the mitigating impact of this evidence. Arguably, the fact that Harris did not shoot until fired upon suggests that he may be less likely to "commit criminal acts of violence that will constitute a continuing threat to society." However, a rational juror could have concluded (based, for example, on evidence of extraneous offenses) that Harris did constitute a continuing threat, while at the same time believing that the death penalty was inappropriate here (because, with respect to the death of Mark Mays, Harris only fired after being himself wounded by Mays). Thus, the mitigating impact of this evidence also has relevance beyond the scope of the second special issue.

The third special issue asks whether "the conduct of the defendant in killing the deceased [was] unreasonable in response to the provocation, if any, by the deceased." This special issue would arguably allow a juror to vote to spare Harris's life based on the fact that Mays shot first, but only if that juror believed that Mays's conduct constituted

"provocation" (a term that was not defined in the jury charge) and that Harris's conduct in shooting Mays was not "unreasonable." However, it is entirely possible that a rational juror could deem the death penalty inappropriate (because Harris did not shoot until wounded), even if that juror had concluded that Mays's conduct did not constitute "provocation" or that Harris's conduct was not "reasonable."[10] The third special issue provided no mechanism for such a juror to express that view.

Even if the third special issue is viewed in the abstract as providing a mechanism to express the mitigating impact of the evidence that Mays shot Harris first, there remains a unique aspect of this case that raises a constitutional defect in the procedure by which Harris was sentenced to die. After this Court decided *Penry I*, the defendant in that case was retried in Texas state court and convicted again of capital murder. At the sentencing phase of his second trial, the jury was asked the same three special issues discussed in *Penry I*. In addition, the jury was also given what has been described as a "nullification instruction" – jurors were told that, if the mitigation evidence convinced them that Penry should not receive the death penalty, they should simply change to "no" one of their "yes" answer to the three special issues. This Court held in *Penry II* that this instruction prevented the jury from giving effect to mitigating evidence because it rendered

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[10] The third special issue, in reality, has little, if any, utility. It is difficult to imagine circumstances in which a rational juror who believed the defendant guilty of capital murder would also determine that the defendant's conduct was reasonable (*i.e.*, that it was not unreasonable). In addition, the third special issue is arguably nullified by an affirmative answer to the first special issue: A determination that the defendant acted "deliberately" with a "reasonable expectation" that someone would die would appear to foreclose a determination in response to the third special issue, that the defendant acted reasonably.

the jury charge contradictory and confusing. The Court found that this scheme put jurors in the untenable position of giving untrue answers to the special issues in order to give effect to mitigating evidence. 532 U.S. at 880.

Although the jury in this case did not receive the nullification instruction given in *Penry II*, the district court correctly determined that the jury charge in Harris's case contained a similar defect. At the guilt phase of his trial, Harris offered evidence that the victim shot him first in the context of Harris's position that he was guilty of voluntary manslaughter, not murder. In rejecting his manslaughter defense, the jury found that Harris's conduct was not committed "under the immediate influence of sudden passion based upon adequate cause." At the sentencing phase, a juror who believed that Harris should receive a life sentence instead of the death penalty (because he shot Mays only after the victim shot him first) could only do so by answering in the negative the third special issue – finding that the killing was not unreasonable in response to the deceased's provocation, if any. Because such an answer would appear to a reasonable juror inconsistent with the answer given on manslaughter at the guilt phase of the trial, the juror could not logically and honestly answer the third special issue in the negative. Accordingly, even if the third special issue would otherwise have provided a means to give mitigating effect to the evidence that Mays shot first, it did not do so in the particular circumstances of this case. *See Penry II*, 532 U.S. at 804.

The Fifth Circuit rejected the district court's finding on this point based, in part, on the conclusion that the "state trial court's construction of the third special issue defines the provocation inquiry more broadly than is the case with the guilt-innocence inquiries of self-defense and manslaughter." 313 F.3d at 243. This is indeed an ironic conclusion in light

of the fact that Harris's jury received no definition from the trial court of the meaning of the term "provocation" as used in the third special issue. Moreover, Texas cases addressing the meaning and purpose of the third special issue do not make clear that the inquiry is broader than the manslaughter question asked at the guilt phase. To the contrary, the Texas cases suggest that the third special issue does nothing more than re-ask the same question previously answered in the voluntary-manslaughter charge. In *Evans v. State*, 601 S.W.2d 943 (Tex. Crim. App. 1980), a case cited by the Fifth Circuit, the problem is made very clear:

> If read literally, the [third special] issue would apply only in situations wherein the offense is really voluntary manslaughter rather than capital murder. Indeed, the requirement that the killing be reasonable is a more difficult requirement to meet than that for reduction to manslaughter.

Id. at 946 (quoting from Crump, Capital Murder: The Issues in Texas, 14 Hous. L. Rev. 531, 560 (1977)). Although the court in *Evans* apparently believed that the jury was not required to read the special issue "literally," the jury is provided with no option but to do so, and a reviewing court should presume that the jury did in fact follow the instructions. *Penry II*, 532 U.S. at 799. A literal reading of the jury instruction and special issues gives rise to the problem identified by the district court here: the voluntary-manslaughter charge and the third special issue ask essentially the same question.

The congruence between the manslaughter charge and the third special issue raises essentially same problem identified in *Penry II*. Any juror who believed that Harris's life should be spared because he had not initiated the gun battle could express that view only by answering the third

special issue contrary to the answer previously given to essentially the same question during the guilt-innocence phase. Review is appropriate in this case to address this unconstitutional restriction on the jury's ability to give full effect to the mitigating evidence in the record concerning the circumstances of the crime.

IV.
THE JURY WAS NOT ALLOWED TO GIVE MITIGATING EFFECT TO HARRIS'S EVIDENCE OF ALCOHOLISM AND INTOXICATION

In *Penry I*, 492 U.S. at 302, this Court held unconstitutional the Texas death-penalty sentencing scheme used at Harris's trial as applied in a case involving mitigating evidence not relevant to, or with relevance beyond the scope of, the three special issues. That holding was based on the concept, recognized in *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), that the Eighth and Fourteenth Amendments require that the capital sentencer "not be precluded from considering, *as a mitigating factor*, **any** aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (italicized emphasis in original; bold emphasis added); *see also Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982) (capital sentencer must be allowed to consider and give effect to "any relevant mitigating evidence") (emphasis added).

In *Penry II*, this Court reaffirmed these principles and emphasized that a jury must be allowed to give "'full consideration and full effect'" to a defendant's mitigating evidence. 532 U.S. at 797 (quoting *Johnson v. Texas*, 509 U.S. 350 (1993) (O'Connor, J., dissenting)).

Here, there was mitigating evidence in the record that Harris was a severe alcoholic and drug addict and that he

was intoxicated at the time of every extraneous offense that the State offered at the sentencing phase in an effort to convince the jury that Harris constituted a continuing threat to society. Although the State disputes this fact, Harris also contends that there was evidence in the record that Harris was intoxicated at the time of Mark Mays' death.

The State understood that evidence of Harris's alcoholism and drug abuse (linked as it was to all of Harris's prior criminal activity) had an aggravating edge. Dr. Gripon, a psychiatrist proffered by the State at the sentencing phase (even though he had never examined Harris) opined that "a history of drugs and substance and alcoholic abuse" is a strong predictor of violent behavior in the future. Also, the State's cross-examination of Harris's witnesses at the sentencing phase focused on the aggravating qualities of alcoholism.

Because evidence of alcoholism and drug abuse can also have a mitigating impact, it is the classic type of double-edged evidence discussed in *Penry I*. The jury must have been provided with an outlet for expressing both the aggravating and the mitigating impact of that evidence. *Penry I*, 492 U.S. at 319.

The Fifth Circuit dealt with this claim by first concluding that "neither evidence of alcoholism nor intoxication at the time of the offense constitutes *Penry* evidence." 313 F.3d at 241-42. The court cited its own precedent – but no decision from this Court – for the proposition that *Penry* evidence must constitute a "uniquely severe permanent handicap" with which the defendant "was burdened through no fault of his own" and that "voluntary intoxication" and "self-inflicted chronic drug and alcohol abuse and the resulting arrested emotional development" do not rise to that level. 313 F.3d at 242.

The Fifth Circuit's exceedingly narrow definition of *Penry* evidence has never been adopted by this Court and, in fact, flies in the face of the repeated recognition by this Court that a jury must be able to consider and give effect to all aspects of a defendant's background and character that are offered in mitigation. *See, e.g., Eddings v. Oklahoma*, 455 U.S. at 110; *Lockett v. Ohio*, 438 U.S. at 604; *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

Furthermore, it ignores this Court's recognition of the "belief, long held by this society, that defendants who commit criminal acts that are attributable to . . . emotional and mental problems, may be less culpable than defendants who have no such excuse." *Boyde v. California*, 494 U.S. 370, 382 (1990).

The Fifth Circuit's categorical refusal to consider as *Penry* evidence alcoholism and drug addiction appears to be based on outdated notions, discredited long ago, that alcoholism and drug addiction are voluntary choices for which blame should be ascribed. Alcoholism has long been recognized to be a disease. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 3d ed. (DSM-III 166-175 (1987).

The Fifth Circuit's approach also seems to be based on the notion that society does not view alcoholism, drug addiction and intoxication as having any true mitigating impact. Contrary to the Fifth Circuit's approach, there is ample evidence that society views alcoholism and drug addiction as bearing on moral culpability for criminal conduct. This is perhaps best demonstrated by the requirement in many states that such evidence be considered as statutory mitigating factors. *See, e.g.*, Cal. Penal Code Sec. 190.3(d) (Matthew Bender 2003); Ill. Ann. Stat. Ch. 38,

¶ 9-1(c); La. Code Crim. Proc. Ann. art. 905.5; Md. Ann. Code art. 27, § 413(c)(iii). Even the State of Texas, in non-capital cases, recognizes that voluntary intoxication can constitute a mitigating factor. *See* Tex. Penal Code § 8.04.

This Court should grant review to address this conflict in the case law and to clarify that alcoholism and intoxication constitute *Penry* evidence.

After holding that alcoholism and intoxication do not constitute *Penry* evidence, the Fifth Circuit went on to hold that, in any event, the second special issue provides "a means" for giving effect to evidence of alcoholism. 313 F.3d at 242. However, the appropriate inquiry under *Penry I* and *Penry II* is whether the special issue gives the jury the means to afford "full consideration and full effect" to the mitigating evidence. *Penry II*, 532 U.S. at 797. Plainly, the second special issue provided the jury a opportunity to express the aggravating impact of Harris's alcoholism (especially in light of Dr. Gripon's testimony and the evidence that all of Harris's prior crimes were committed under the influence), but it just as plainly did not provide any outlet to express the mitigating side of that evidence.

The Fifth Circuit also said that the mitigating impact of intoxication can be "fully considered under the first special issue." While it may be correct that the first special issue provides some opportunity to consider evidence of intoxication, the court failed to explain how the separate evidence of Harris's alcoholism can be addressed within the context of that special issue. Simply put, a juror who believed that Harris's life should be spared because of his alcoholism (and the fact that all his extraneous offenses were alcohol-related) had no means to express that view in answer to the first special issue, which asked only whether the shooting of Mark Mays was deliberate.

The Court should also grant review to consider the important question of whether evidence of alcoholism, drug addiction and intoxication can be fully considered in the context of the three special issues posed to Harris's jury.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted

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Dated: March 17, 2003